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Insurance & Financial Services Ombudsman

Getting help when you have difficulties with your insurer or financial services provider

The Insurance & Financial Services Ombudsman office (IFSO) was established in 1995 to help consumers who were in dispute with their insurers or financial services providers.

The IFSO[1] is a free, independent entity to which you can lodge a complaint regarding the conduct and decisions of insurance and financial services providers, once you have exhausted that provider's internal complaints procedures.

In the 2017–18 year, the IFSO received 3,357 enquiries about its services, and investigated 320 formal complaints – 304 of which related to insurance.

Of all complaints investigated by the IFSO in 2017–18:

- 2.2% were upheld
- 23.5% were settled through negotiation, conciliation and mediation
- 2.2% were partly upheld
- 0.3% were withdrawn, and
- 71.8% were not upheld.

Although this may seem like a small success rate, this data is a reflection of the strength of the IFSO regime in keeping its members in check. The majority of genuine complaints are dealt with by providers before the complainant approaches the IFSO.

How does it all work?

The IFSO's mandate is to ensure the major players in the banking, insurance, investment and financial advisory services (called 'providers') act in accordance with fair trade practices and in line with their policies.

The IFSO's role is to:

- Provide a dispute resolution service for insurance, loan, investment and financial advisers, and

1 The current IFSO is Karen Stevens, but her title is still 'Ombudsman'.

IN THIS ISSUE »

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- Resolve disputes with a range of providers, including major banks, insurance companies, KiwiSaver schemes and brokers.

Situation where the IFSO can help you

Here's an example of a situation that could escalate to where you could have a valid complaint about your insurer or financial services provider.

You and your partner consider yourselves fairly adept at home DIY, and you've decided to upgrade some existing wooden-framed windows to aluminium with double-glazing. You pick a seemingly sunny afternoon to remove the existing windows, expecting the glazier to deliver the new windows that afternoon.

By late afternoon the new double-glazed windows are nowhere in sight and, unexpectedly, the weather starts to turn. Luckily you were prepared for this, with building wrap on hand to provide a temporary seal over the hole in the exterior wall. But during the night, the wind increases and the building wrap is ripped off. The next morning you wake to find that your carpet, curtains and furniture are ruined from the wind and rain that have got inside your house.

Although devastated, you are comforted that you have up-to-date insurance. Unfortunately, when you make a claim with your insurer, you find your claim has been turned down. How can that be?

Way down in the fine print is a clause stating that damage resulting from major building works is excluded under your policy.

You protest and say that the building works were only minor. You had checked with your local authority; no building consent was required for upgrading window frames. You thought the temporary seal would have been sufficient; it didn't seem possible that the wind could rip off the seal.

The insurance company simply states that their policy is clear on this matter and refuses to process your claim.

Annoyed, you decide to approach your bank asking for a loan to repair the damage from the wind and rain to your house contents. Unfortunately, the bank turns down your loan application, saying you have an unpaid credit card that had accumulated fees and interest of which you weren't aware.

You approach your lawyer, as the damage to your property, and associated costs, could be in the thousands. It seems so unfair! Your lawyer writes to the complaints officer of your insurance company, formally requesting a resolution to this claim. Likewise, an email is sent to your banker identifying that you are unhappy with the fees applied to your credit card, and that you would like to make a complaint. You do not receive satisfactory replies from either provider.

The next step is to ask the IFSO for help.

Lodging a complaint with the IFSO

To lodge a complaint with the IFSO, you will need a 'letter of deadlock'. In the above scenario, two letters are needed, one from each provider. These letters indicate to the IFSO that you have made all efforts to resolve this matter through these providers' own complaints processes.

Once you have these letters of deadlock, you complete the application form and send it to the IFSO's office; the IFSO office will begin to make its own enquiries. This will include speaking with the bank/insurance company/adviser, looking at your policies, and any terms and conditions that you have agreed to. Has the provider interpreted the terms and conditions in a fair and reasonable manner?

The IFSO will also check that you have been provided with copies of these terms and conditions, and that you were given the opportunity to consent to them or to cancel the agreement before being charged additional fees.

In our scenario, after reviewing the various aspects of your complaint, the IFSO identifies that the definition in your insurance policy was sufficiently clear – stating that 'major' work included any exterior work that could impact on the weathertightness of the building. The IFSO did advise that the wording on the policy may be difficult for a consumer to find, and that it contained technical jargon that may impair their interpretation.

While the insurance company was not required to accept your claim, it offers a settlement of $2,000 acknowledging that the wording in their policy should be clearer and provided in a more accessible format.

The matter with your bank has also proved positive. The IFSO found that the unexpected fees and resulting interest were the result of policy changes introduced after you signed the agreement and these changes were not disclosed to you. The bank agrees to reverse its fees.

This story had a successful outcome for the complainants. It's worth knowing, however, that a provider does not have to accept the IFSO recommendations as that is a commercial decision for that provider.

If you are not sure about a decision made by one of your providers and would like further information on what your next steps could be, go to www.ifso.nz and search 'information sheets'.

If you cannot resolve a dispute between your insurer or financial services provider yourself, please talk with us about contacting the IFSO to discuss your options. *

Capital gains tax

Tax Working Group proposals

The much-anticipated final report of the Tax Working Group (TWG) was released on 21 February and, unsurprisingly, recommended the introduction of a broad-based, realised capital gains tax (CGT) regime.

A summary of the recommendations is below.

What will be taxed?

- All forms of land (except the family home), shares, intangible property and business assets. The TWG recommends excluding personal use assets such as cars, boats, jewellery, fine art, collectibles and other household durables
- Only gains arising after 'valuation day' would be taxed, and
- Taxpayers would have up to five years to determine the market value of assets as at valuation day. If a valuation is not obtained, a 'default rule' would apply. This would impose an estimated $4.5 billion compliance cost on affected taxpayers.

When will it be taxed?

- CGT would apply on a realised basis only but would be subject to a number of concessions/exclusions referred to as 'rollover relief'
- Rollover relief would apply to all inherited assets, assets donated/gifted to donee organisations (charitable entities), certain involuntary events where the proceeds are invested in a similar replacement asset, eg: an insurance event/natural disaster, certain business restructures, small business rollover where funds are reinvested in a replacement business
- In terms of gifted assets, rollover relief would apply where the gift is to the person's spouse, civil union or de facto partner but otherwise would not qualify for relief
- CGT would be imposed at the person's marginal tax rate. The TWG recommends against adjusting for inflation or discounting the tax rate
- The cost of an asset including capital improvements can be deducted against sale proceeds to arrive at the taxable capital gain. Holding costs such as interest or rates would not be claimable against personal use assets, and
- Subject to limited exceptions, capital losses should generally be capable of set-off against both ordinary and capital income.

Transitional rules

A number of transitional rules for assets held on valuation date are also proposed including:

- Flexible and default valuation rules for valuation date assets mandated by Inland Revenue
- A median rule for assets held on valuation date where the 'cost' to be deducted from proceeds to determine the capital gain amount will be the middle value of actual cost (including improvements), valuation date value and sale price. The intention is to stop artificially high valuations being adopted at valuation date, and
- Transitional rules for immigration/emigration, and changes in use.

Who is taxed?

New Zealand tax residents will be subject to CGT on worldwide assets. Non-residents will be subject to CGT only on New Zealand-sourced capital gains.

Company matters

In a nutshell, there is some discussion dedicated to the potential for double taxation and double deductions for gains and losses in the corporate context. For example, a company is taxed on realisation of an asset and the shareholder may be taxed again on the same underlying gain via the increased share value.

Imputation continuity rules: The TWG recommends the continuity rules governing the carry forward of imputation credits be removed.

Foreign shares: The current regime dealing with interests in foreign investment funds (FIF) is to be retained with some possible refinements. However, CGT will be imposed on foreign shares which are not currently subject to the FIF regime.

There is also some discussion around portfolio investment entities including KiwiSaver funds. At a very general level, the proposal is that these entities will also be subject to CGT on investments not dealt with under the FIF regime.

Dissenting views in the TWG

Three of the TWG's 11 members disagree with the TWG's recommendation to introduce a comprehensive CGT regime. Their collective view is that the costs of introducing the proposed CGT regime would clearly outweigh the benefits.

They suggest an incremental extension of the tax base over time, ie: extending the tax base on an asset-by-asset basis. In their view, an extension to the taxation of residential rental properties is the most obvious starting point. *

Our thanks to nsaTax for writing this commentary.

Wiping the slate clean

The seven year itch

The Clean Slate Act or clean slate scheme, more formally and correctly known as the Criminal Records (Clean Slate) Act 2004, became law almost 15 years ago. The rationale behind the legislation was to enable people who had certain convictions to put their past behind them without the stigma of a permanent conviction. Having a criminal record can have far-reaching consequences for employment, immigration, voluntary work and various other matters.

What the legislation means

The Clean Slate Act limits the effect of convictions if certain criteria are satisfied. If it has been seven years since you were convicted, you will be considered to have no criminal record and can state this to anyone who asks.

Before you can be considered to be 'clean-slated', however, you must have:

- No convictions within the last seven years
- Never received a custodial sentence
- Never been convicted of a specified offence such as sexual offending against young children
- Never been indefinitely banned from driving
- Never been held in hospital by the court in a criminal case due to your mental state, and
- Paid any fine, compensation, reparation or other monetary penalty ordered by a court in sentencing.

Section 14 of the Clean Slate Act expressly states that when asked, you can state that you have no criminal record if you are eligible under the legislation. The application of the Clean Slate Act is automatic (you don't have to apply) and, once 'clean slated', your criminal record should show no convictions.

Your conviction record will not, however, be completely removed from police records. It is, however, an offence for an employer or anyone else to ignore the legislation and require you to declare convictions that have been subject to the clean slate scheme. Anyone who requires disclosure of 'clean slate' convictions can be fined up to $10,000.

It is also an offence for any government employee to disclose your full criminal record when it has been concealed. The maximum penalty for that is a fine of up to $20,000.

It's worth noting that all your convictions will be reinstated on your record if you are convicted again or if you do not pay any court-ordered fines, compensation or costs, or if you are permanently banned from driving.

Exceptions

There are a number of exceptions in the clean slate regime. If you are eligible under the Clean Slate Act to have your conviction/s 'removed', you must still declare all convictions if you apply for a job in a national security role, as a police employee, prison or probation officer or security officer or as a judge, Justice of the Peace or Community Magistrate.

The relevant government departments can disclose your criminal record in other situations. These include applications for firearms licences, when it may be relevant to other court proceedings, or if you apply for a role involving the care and protection of young people and for the purpose of an investigation under the Oranga Tamariki Act 1989.

When travelling overseas, the immigration form often asks if you have any convictions. Before you depart, we recommend you check the situation with the embassy of the country to which you are travelling.

A recent situation

In a recent case, *D v New Zealand Police*[2] the High Court wiped the criminal record of a convicted sex offender to allow D to obtain work in a rest home. D had historic convictions for sexual offences against a 12-year-old boy. (The Clean Slate Act does not allow convictions for sexual offending to be wiped after seven years.) D had applied to the District Court for an order concealing his criminal record. The application was declined and D appealed the decision.

The High Court considered that D would be highly unlikely to gain employment in the aged care sector unless his criminal record was concealed. After considering D's remorse, and the evidence of expert witnesses regarding the risk of reoffending, the appeal was upheld. D's criminal record was cleared.

Your own record

Anyone can apply to the Ministry of Justice for a copy of their criminal and traffic history. This is helpful if you are applying for a job where convictions, or the lack of them, is important. It may be detrimental to withhold relevant information, particularly if you have misunderstood whether any offending has been wiped. In a job application, it would be awkward to assume you have been 'clean slated' if this is not the case and any convictions come to light in background checks.

The Clean Slate Act has been useful in allowing people to put the past behind them without the taint of a criminal record. However, you can't always escape the past.

When the clean slate legislation was enacted in 2004, social media and Google were in their infancy. Even with a clear criminal record resulting from the regime, details of your past may be found online or on social media channels. ✱

2 *D v New Zealand Police* [2018] NZHC 3349

Fineprint | ISSUE 78 Autumn 2019

Property (Relationships) Act 1976 changes proposed

For better, for worse?

The law governing the division of property when a relationship ends is, after more than 40 years, set to change following the Law Commission's comprehensive review of the Property (Relationships) Act 1976 (the PRA).

The Law Commission has identified changes that it believes should be made to ensure the regime better reflects the reasonable expectations of New Zealanders. We set out some of the proposals that may be relevant to you or your family.

The family home

Under the current law, in a marriage, civil union or de facto relationship of more than three years, the family home is automatically considered to be relationship property and subject to equal sharing. Under the changes proposed, the family home will not necessarily be shared 50/50, particularly if one partner owned it before the start of the relationship. In that situation, it is proposed that only the increase in value would be subject to equal sharing.

Clean break

The foundation of the current PRA is the idea that couples should start afresh, free from financial ties to each other, as soon as practicable after their relationship ends. The proposed changes, however, include an 'overarching obligation' on the courts to have regard to the best interests of any minor or dependent children. This includes a proposal that the parent who has day-to-day care of the child or children has an automatic right to remain in the family home for a limited period.

Family Income Sharing Arrangement (FISA) proposal

A significant proposal is to pool and share partners' incomes after separation through a Family Income Sharing Arrangement (FISA). In a relationship of 10 years or longer, or where there are children involved, it recommends that in circumstances where, during the relationship, one partner has given up their career or declined a career advancement opportunity to make a contribution to the relationship, or their spouse has been able to advance their career due to the contributions of their partner to the relationship, this may entitle them to share in a FISA.

It is proposed the amount and duration of a FISA would be determined by a formula equalising the partners' incomes for a period of time that is approximately half the length of the relationship up to a maximum of five years.

Trust property

Presently, the jurisdiction of the Family Court to make orders relating to trust-owned property is limited. Often, matters related to trusts can involve High Court proceedings which can be expensive and protracted for all concerned. Under the proposed changes, the Family Court would have greater jurisdiction to make orders involving trust-owned property.

Early days yet

If your relationship is ending, or you have already separated, it's important that you get advice early on so that you can make informed decisions. If you would like to talk over any aspect of relationship property and how ending a relationship works from a legal perspective, please get in touch with us. ✱

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Postscript

Employment law changes

Since 1 April 2019, the Domestic Violence – Victims Protection Act 2018 has imposed new obligations on employers under employment legislation[3] and the Human Rights Act 1993.

Employers must provide up to 10 days per year of paid domestic violence leave. Employees may take this leave as needed in order to deal with the effects of domestic violence. Employees who are victims of domestic violence can ask for short-term changes to their employment terms; employers must consider these urgently.

A number of significant law changes have been incorporated into the Employment Relations Amendment Act 2018. Many of these changes will take effect from Monday, 6 May 2019, including:

- 90-day trials: 'large employers', those with 20 or more employees, will not be able to use the 90-day trial period, although it's still available to employers with 19 or fewer employees. Probationary periods are still allowable
- Rest and meal breaks: the legislation provides minimum allowances for rest and meal breaks. Employers and employees are free to agree on when these will be taken; if there's no agreement, these breaks must be evenly spaced during the work day
- 'Reinstatement' has been restored as the 'primary remedy' for grievances claiming unjustified dismissal, and
- Significant changes for employers who use collective agreements.

As always with employment law matters, do tread carefully as there are significant penalties for employers who get it wrong. If in any doubt, please don't hesitate to contact us. ✱

Drones: know the rules

In our Winter 2017 issue, we published an article *Up in the Air: Using your drone* which gave some guidelines on using drones. With drones becoming more common, for both personal use and for business purposes, we thought it worthwhile reminding you of the law surrounding their use.

The Civil Aviation Authority (CAA) has rules regarding the piloting of drones to help minimise any risk to the public. Civil Aviation Rules (Part 101) have provisions that you must adhere to when piloting a drone that weighs under 25kg; most drones are under this weight.

If you're caught not complying with Part 101 of the CAA Rules, you can be prosecuted by the CAA. The fines range from $500–$1,000. Other prosecutions under, say, the Privacy Act 1993, could be much heftier.

If you are a drone operator, you must know the rules. Go to www.caa.govt.nz to find out more. Remember, ignorance of the law is no excuse. ✱

3 The Holidays Act 2003 and the Employment Relations Act 2000.

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